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NO. _____

IN THE

Supreme Court Of The United States

October Term 1983

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; GEORGE W. CAMPBELL, etc., et al.,
Petitioners,

v.

MARTHA JOHNSON and DELORES J. CEBALLOS, individually and on behalf of others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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III. QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding the trial judge failed adequately to substantiate his findings?

2. What standard of appellate review is appropriate in attorney fee litigation?

3. Did the court of appeals err in requiring an adjustment of plaintiffs' attorneys fees to reflect delay in payment?

4. Did the court of appeals err in reviewing the district court's reduction for reconstructed time?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, University College of the University of Alabama in Birmingham; George W. Campbell, et al.,[1] respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 10, 1983.

[1]The Board of Trustees of the University of Alabama, Joseph F. Volker, President of the University of Alabama in Birmingham, Frederick W. Conner, Dean of the School of Arts and Humanities of the University of Alabama in Birmingham, and George C. Wallace, President Ex-Officio of the Board of Trustees of the University of Alabama likewise petition this Court to review the decision of the Eleventh Circuit.

I. OPINIONS BELOW

The opinion of the Court of Appeals dated June 10, 1983 is reported at 706 F.2d 1205 and appears in the separate Appendix to this Petition at pages 1-12. The Opinion of the District Court for the Northern District of Alabama also appears in the separate Appendix to this Petition at pages 12-26.

II. JURISDICTION

The opinion and judgment of the Court of Appeals for the Eleventh Circuit were entered June 10, 1983. (App. 1). On June 28, 1983, the University filed a petition for rehearing by the original panel. On August 11, 1983, the Court of Appeals denied the University's petition for rehearing without comment. (App. 28). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

III. QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding the trial judge failed adequately to substantiate his findings?

2. What standard of appellate review is appropriate in attorney fee litigation?

3. Did the court of appeals err in requiring an adjustment of plaintiffs' attorneys fees to reflect delay in payment?

4. Did the court of appeals err in reviewing the district court's reduction for reconstructed time?

IV. STATEMENT OF THE CASE

This petition raises fundamental questions as to the role of the appellate courts in reviewing attorney fee award litigation. On June 15, 1979, approximately two weeks before trial was scheduled to begin in this Title VII class action, the parties filed a proposed Consent Decree which was approved by the District Court. In their Consent Decree, the parties agreed to negotiate the amount of attorneys fees, and, if negotiations failed, to submit the fee claim to the District Court. These ef-

forts proved unsuccessful and resulted in protracted discovery and litigation of the issue of attorneys' fees. After a two-day hearing that followed months of discovery on the fee issue, submissions of documentary evidence by all parties, and a pre-trial conference, on September 19, 1980, the District Court awarded plaintiffs interim fees of $50,000, and on September 25, 1981, the Court issued its final opinion and order in which it increased the interim award by $8,183.67. Plaintiffs appealed the trial court's decision arguing that the court had abused its discretion in determining the amount of attorneys fees to be awarded.

On June 10, 1983, the Eleventh Circuit Court of Appeals issued its opinion reversing in part and remanding to the trial judge various issues pertaining to its determination of the attorney fee award. The University filed a petition for rehearing by the original panel asserting that rehearing was necessary by the panel, as the panel had rendered its decision without considering the Supreme Court's recent and controlling decision in *Hensley v. Eckerhart*, ___ U.S. ___, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). The University's petition for rehearing was denied August 11, 1983, without comment.

V. REASONS FOR GRANTING THE WRIT

1.

The Decision Below By The Eleventh Circuit Court Of Appeals Conflicts With Important Decisions Of Other Appellate Courts Respecting the Substantiation Required to Support a Trial Court's Discretion in Awarding Attorneys Fees and Respecting the Appellate Court's Role in Reviewing that Discretion.

Most notably, the opinion of the Eleventh Circuit conflicts with decisions of other appellate courts with respect to the burden the District Court must bear in substantiating its findings. Contrary to the procedure established in other circuits, the Eleventh Circuit engaged in extensive scrutiny and second-guessed the explanations for the District Court's exercise of its

discretion. Moreover, in several instances the panel reversed or remanded an issue to the trial judge when the Appellate Court disagreed with the District Court's analysis of the record or when the panel felt that the District Court failed adequately to substantiate its findings.[2] If the principals enunciated and approach applied by the Eleventh Circuit here are to be followed by district courts in this Circuit, district judges may reasonably question what lengths they must go to in substantiating their findings.

For example, here the trial judge made specific findings with respect to certain factors enunciated in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974), "the amount involved and the results obtained", and "the novelty and difficulty of the questions"; notwithstanding *Eckerhart's* holding that only "in some cases of exceptional success an enhanced award may be justified", the Eleventh Circuit rejected these findings and substituted its own analysis of these factors *without* finding the district court abused its discretion in evaluating these factors. The trial judge specifically held that it "did not find this case to involve any novel or unusually difficult questions of law" (R. 302). With respect to the results obtained, the court noted

> [I]n examining the results obtained in this case, the court must note that only *five* individuals out of the potential class of 112 (excluding the two named) plaintiffs have sought to advance a claim. The lack of interest by the class precludes this litigation from being characterized as watershed litigation.

(R. 306)[3] However, the appellate court makes assumptions to the contrary by referring to plaintiff's "significant victory". In

[2]This is not an isolated instance of the Eleventh Circuit's perception of its role in reviewing attorneys fee litigation. *Morgado v. Birmingham-Jefferson Cty. Civ. Defense,* 706 F.2d 1184 (11th Cir. 1983), issued the same day by the same panel, likewise engaged in such appellate factfinding and impermissible substitution of the appellate court's judgment for that of the District Court.

[3]Furthermore a review of the record indicated that although the plaintiffs vigorously sought a University-wide class, ultimately the class certified

so doing, the Eleventh Circuit ignored the District Court's judgment, yet did not make a finding that the District Court abused its discretion in evaluating the case's importance.

Another example of the Eleventh Circuit's disregard for the trial judge's analysis of the record and substitution of its judgment for that of the District Court is found in its reversal of the District Court's deletion of duplicative hours based on its finding that the "record does not sustain its rejection" and due to the District Court's "fail[ure] to specify any instances of duplicative effort".[4] Thus, the Eleventh Circuit in requiring the district court to itemize the hours it found to be duplicative has adopted a requirement not imposed by other courts of appeal and in fact rejected as too onerous by other appellate courts. In contrast to the Eleventh Circuit's requirement of an hour-by-hour discussion of each attorney's time sheet, other appellate courts have held that the district court need merely explain the basis for its decision sufficiently to permit the court of appeals to determine, on review, whether the record supports its decision. *See Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc) ; *Neeley v. City of Grenada*, 624 F.2d 547 (5th Cir. 1980) ; *Norwood v. Harrison*, 581 F.2d 518 (5th Cir. 1978), *affirming* 410 F. Supp. 133, 142 N. 10 (N.D. Miss. 1976) ; *Kiser*

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was limited to faculty in the School of Humanities—one of six schools in the University College. The University's massive Medical Center was totally excluded. (R. 78-83).

[4]The Eleventh Circuit merely refers to the District Court's exclusion of time spent by out-of-town counsel due to unnecessary duplication. The Court fails to mention that the District Court excluded time for duplicative work at the same time it excluded hours claimed for other unnecessary work and for non-legal work since all hours related to the Johnson factor of "time and labor required".

The amount of hours deleted for duplication, just over 50 hours, constitute less than 5% of the total time claimed. While the District Court did not engage in an hour-by-hour analysis of the 50 hours or identify which tasks in which days it found to be duplicative, the District Court's finding of duplication was supported by the attorneys' time summaries which revealed, *inter alia*, numerous instances where day after day an attorney did nothing other than confer with co-counsel. The District Court weighed the hours claimed against its own knowledge and experience to determine that some of the hours claimed indeed were duplicative.

v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), *aff'd in part rev'd and remanded on other grounds sub nom. Kiser v. Huge*, 517 F.2d 1237 (D.C. Cir. 1974). As the Second Circuit recently stated in affirming the district court's percentage reductions for duplication:

> In similar cases with voluminous fee applications, courts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application. See *Copeland v. Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc) (22% cut); *Ross v. Saltmarsh*, 521 F. Supp. 753, 761-62 (S.D.N.Y. 1981) (5% and 10% cuts), aff'd mem., 688 F.2d 816 (2nd Cir. 1982); *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1056 (S.D.N.Y. 1977) (10% cut), aff'd mem., 578 F.2d 1368 (2d Cir. 1978). These courts have endorsed percentage cuts as a practical means of trimming fat from a fee application.

New York Association for Retarded Children v. Carey, 711 F.2d 1136, 1146 (2nd Cir. 1983). The Eleventh Circuit's remand to the District Court based on its finding that the trial judge failed to specify any instances of duplicative work effort and based on the Eleventh Circuit's perception that the record did not sustain this reduction puts an unusual burden on future district courts to substantiate their findings. District courts in the Eleventh Circuit now face the onerous task, not required of courts in other circuits, of analyzing attorneys' time logs on an hour-by-hour basis in order to support any reduction of time. Such a task is so burdensome it will likely encourage trial courts to accept an attorney's hours even where unnecessary duplication has occurred, with the result that any consideration of duplication will be forgone and the trial court's discretion in this regard will be removed.

Similar disregard of the trial judge's findings of fact were present with respect to the Eleventh Circuit's disposition of the District Court's refusal to compensate plaintiff's attorneys for time spent litigating the fee question. In addition to concluding that the consent decree which governed the attorney fee award did not provide for compensation for time spent on the fee petition, the District Court noted:

> Additionally, it was the plaintiffs that requested the evidentiary hearing which brought into play the full panoply of discovery. It seems inequitable to pay the plaintiffs a premium because they brought on additional litigation after the consent decree, including *time spent filing motions that appear extraneous and unnecessary.*

(R. 301) (Emphasis added).

The Eleventh Circuit, however, held that there was nothing in the record to support the trial judge's conclusion that plaintiffs were responsible for the additional litigation. In view of the trial judge's familiarity with the circumstances giving rise to the additional litigation and in view of the District Court's having presided over the pre-trial conference and fee hearing, surely it is within the District Court's sound discretion to disallow compensation for time spent on the fee issue. By requiring the record to provide evidence as to what actions of counsel were "extraneous and unnecessary",[5] the Eleventh Circuit has departed from the evidentiary standard followed by other appellate courts, which defer to the trial court's judgment on such matters recognizing that the district court is in the best position to evaluate the reasonableness of the time claimed. In so doing, the Eleventh Circuit has substituted its judgment for that of the District Court.

Likewise, the Eleventh Circuit, impermissibly substituted its judgment for that of the District Court with respect to the risk factor in awarding a bonus.[6] A final illustration of appellate

[5]The record revealed no less than seven unsuccessful motions and related memoranda filed by plaintiffs' counsel resisting disclosure of the time and expense records and resisting discovery requests pertaining to the factors enumerated in *Johnson*, which the University had propounded in order to evaluate the reasonableness of plaintiff's fee request. However, the Eleventh Circuit was unwilling to accept the District Court's judgment that such motions reflected wasteful and unnecessary time.

[6]The District Court awarded a 10% contingency bonus. In awarding this bonus the court noted that plaintiffs failed to present any precise evidence regarding the extent of the risk undertaken and furthermore that the contingent nature of the case was reduced by the fact that plaintiffs' attorneys received payment from the Lawyer's Committee for Civil Rights. The District Court noted: "These payments made the financial risk minimal". (R. 305).

factfinding by the Eleventh Circuit is its reversal of the District Court's exclusion of computer expenses which was based on a finding by the District Court that plaintiffs had failed to comply with a court order requiring substantiation of their expenses.[7]

The Eleventh Circuit reversed stating:

> This court has held that an award of attorneys fee should not be *reduced* simply because counsel is receiving compensation from third parties.

Johnson v. Univ. Col. of Univ. of Ala. in Birmingham, 706 F.2d 1205, 1210 (11th Cir. 1983) (emphasis added) (citations omitted). Thus, not only did the Eleventh Circuit substitute its judgment for that of the District Court with respect to the risk factor, but its rejection of the District Court's analysis was also based on a misapplication of prior cases decided by the Eleventh Circuit. Here, the District Court did not reduce plaintiffs' attorneys fees due to their counsel's receiving compensation from third parties. Instead, the trial court merely took this factor, among others, into account in determining the amount by which the court would *increase* the award. There is a material difference between reducing the base award due to counsel's partial compensation from third parties and taking that factor into consideration when analyzing the risk factor for purposes of awarding a bonus.

[7]By court order the plaintiffs were given 15 days to furnish information regarding their request for recovery of computer costs and the Magistrate's recommendation, likewise, cautioned that if "complete documentation is not received regarding expenses claimed by the date determined by the District Court, it is recommended that each such claim be eliminated as the basis for claiming reimbursement." (R. 275). The District Court adopted this recommendation and required plaintiffs to substantiate the expense in advance of the hearing.

It was undisputed that plaintiffs failed to provide any explanation for the computer costs prior to the hearing, yet the Eleventh Circuit remanded to the District Court the issue of the recovery of computer costs, concluding that the court overlooked the plaintiffs' compliance with the court order due to one of the attorney's "willingness to explain the computer cost" at the hearing. It should be noted, however, that the attorney who offered to make the explanation, Ms. Reeves, was not the attorney who had incurred and claimed the expenses. (R. 186 ¶ 11). The Eleventh Circuit's opinion was also based on the fact that the plaintiffs furnished invoices and ledgers; none of these, however, provided the requested explanation for the expense. These errors by the Eleventh Circuit demonstrate the dangers of the standard of review utilized by the Eleventh Circuit as only the District Court was intimately familiar with the circumstances underlying its exercise of discretion.

The preceding discussion demonstrates numerous instances of appellate factfinding and substitution of the appellate court's judgment for that of the trial judge. The approach taken by the Eleventh Circuit is directly contrary to decisions in other circuits which hold that in reviewing the district court's exercise of its discretion, the appellate court is not to substitute its ideas of fairness for those of the district judge absent evidence that he acted arbitrarily and that such evidence must constitute a clear showing of abuse of discretion. *Thornberry v. Delta Air Lines*, 676 F.2d 1240 (9th Cir. 1982); *Copeland v. Marshall, supra*; *Ridgeway v. United Hospitals - Miller Division*, 563 F.2d 923, 927 (8th Cir. 1977); *Comacho v. Colorado Technical College*, 590 F.2d 887 (10th Cir. 1979); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1967); *Louisville Black Police Officers v. U.S.*, 700 F.2d 268 (6th Cir. 1983). The standard established by the Eleventh Circuit conflicts not only with the decisions of other circuit courts on the same subject, but with the general principles originally established by the Fifth Circuit in *Johnson v. Georgia Highway Express* for awarding attorneys fees. The Eleventh Circuit's standard is unique with respect to the heavy burden it places on the District Court and with respect to the liberal role it takes in reviewing such decisions. Moreover, the approach adopted by the Eleventh Circuit prompts district courts in this circuit to speculate as to what type of explanation for the court's findings will suffice when rendering opinions in future attorney fee litigation. Thus, guidance by this court is necessary in order to aid trial judges with respect to the degree of substantiation of their findings that are required in rendering attorneys fee decisions. District courts must have a clear standard in order to assure that they can render effective decisions in attorney fee litigation. Likewise, this Court must address the role of the appellate court in reviewing attorney fee decisions to avoid turning the issue of the amount of attorney fees to be awarded into lengthy, major litigation. Only action by this Court can establish a clear and uniformly-applied standard.

2.

The Eleventh Circuit's Treatment Of Delay In Payment Is Contrary To The Decisions Of Other Appellate Courts.

The courts of appeals have established different standards for determining whether any enhancement for the delay in payment is appropriate. The Sixth Circuit recently held in *Louisville Black Police Officers v. City, supra,* that an adjustment to reflect delay was not warranted where "a relatively few number of years [were] involved . . . (1974 to 1981)." *Id.* at p. 1510. In so holding, the court noted that the bulk of the attorney's services (83.2%) were rendered during 1977 through 1979, thus only a four-year delay was involved. Likewise, in *Northcross v. Board of Education in Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. den.* 447 U.S. 911 (1980), the Sixth Circuit, in reviewing a district court's award of attorneys fees in 1977 and again in 1978, made no adjustment in 1980 for inflation with respect to the 1978 award. Instead, the court noted such an adjustment for delay was discretionary and adjusted for inflation only with respect to the 1977 award which involved services rendered as early as 1960 for which plaintiff's attorneys would not be compensated until 1980.

Likewise the Circuit for the District of Columbia has held that an award for delay in payment is discretionary. *National Ass'n of Concerned Veterans v. Sec. of Defense,* 675 F.2d 1319, 1329 (D.C. Cir. 1982); *Copeland v. Marshall, supra*; *Lindy Bros. Building, Inc. v. Am. Radiator,* 540 F.2d 102, 117 (D.C. Cir. 1976). Indeed, the court in *Nat. Ass'n. of Concerned Veterans* stated:

> "No precise formula is available to measure the delay factor. Some delay in receipt in payment is inevitable in the law as in any other service profession. Accordingly, any minimal delay may properly be ignored by the District Court in setting a fee award. Delay solely attributable to dilatory action by the plaintiff should also be discounted."

Nat. Ass'n. of Concerned Veterans of Defense, 675 F.2d at p. 1328.

Contrary to the approach of other circuits, the Eleventh Circuit in *Johnson* held:

> District courts *should* take into account inflation and interest . . . we do not prescribe any set method for correcting for delay in payment, but some form of correction *must be undertaken.*

Johnson v. Univ. Col. of Univ. of Ala. at Birmingham, 706 F.2d 1205, 1210-1211 (11th Cir. 1983) (emphasis added). Thus, here the Eleventh Circuit required such an adjustment, removing this determination from the discretion of the district judge.[8] Resolution of this conflict is necessary.

3.

The Eleventh Circuit's Treatment of Reductions for Reconstructed Time Conflicts with the Supreme Court's Decision in *Hensley v. Eckerhart* and the Decisions of Other Appellate Courts.

The Eleventh Circuit's rejection of the District Court's reduction for reconstructed time was directly contrary to *Eckerhart.*[9] Likewise, the reduction for reconstructed time is contrary to the decisions of various appellate courts. *New York Ass'n for Retarded Children v. Carey, supra* at p. 1147; *National Ass'n of Concerned Veterans v. Secretary of Defense, supra* at p. 1327 (D.C. Cir. 1982); *Clairborne v. Illinois Cen-*

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[8]Here, as in the *Louisville* decision, only five years elapsed between the institution of this action and the time the suit was settled in 1979. Moreover, as in *Louisville,* the majority of the plaintiffs' attorneys' services (71%) were rendered after 1976. Indeed, a significant portion of the time for which reimbursement is requested came after the case was settled. Moreover, as the trial judge noted, plaintiffs' counsel were paid $50,000 in interim fees in 1980. (R 312).

[9]The District Court reduced one-third of the hours claimed by one of plaintiffs' attorneys, Ms. Reeves, due to her failure to maintain contemporaneous time records. This holding ignores *Eckerhart's* express endorsement of a thirty percent reduction in hours claimed due to the failure to keep contemporaneous records. Indeed, this Court held "where the documentation of hours is inadequate, the District Court may reduce the award accordingly". *Eckerhart, supra,* at p. 4554.

tral R.R., 583 F.2d 143, 155 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); 5th Cir. R. 22.2, reprinted in 693 F.2d No. 3, at lXXiii (Jan. 10, 1980).

VI. CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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Order of United States Court of Appeals for the Eleventh Circuit upon Petition for Rehearing A-28

Martha Johnson and Delores J. Ceballos, etc., Plaintiffs-Appellants,

v.

UNIVERSITY COLLEGE OF the UNIVERSITY OF ALABAMA IN BIRMINGHAM; George W. Campbell, etc. et al., Defendants-Appellees.

No. 81-7860.

United States Court of Appeals,
Eleventh Circuit.

June 10, 1983.

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Judge.

RONEY, Circuit Judge:

This is another in a series of civil rights actions in which the appeal concerns solely the award of attorney's fees under Title VII, 42 U.S.C.A. § 2000e-5 (k), and the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C.A. § 1988, not the merits of the lawsuit. Two weeks prior to the scheduled trial in this employment discrimination class action, the named parties filed a proposed consent decree which the district court accepted. The consent decree acknowledged defendants' obligation to pay plaintiffs' fees, and pledged that the parties would try to negotiate the proper amount. When these efforts proved futile, plaintiffs, in accord with the decree, filed a motion for fees with the court. Discovery, motions to compel and quash, a two-day hearing, and a fight over the terms of an offer of judgment ensued. Finally, nearly one year after the consent decree was filed, the district court awarded interim fees of $50,000. A year later in its final disposition of the fee issue, it awarded an additional $8,183.67, bringing the total award to $58,183.67, an amount which reflected reductions in the hourly rate, hours worked, and litigation expenses that plaintiffs' coun-

sel claimed. Pursuant to Fed.R.Civ.P. 68, the district court assessed costs against plaintiffs because the fee award was less than the amount defendants offered prior to the fee hearing.

Plaintiffs have appealed both the amount of the attorney's fees award and the assessment of costs. We reverse and remand for reconsideration of both. The ensuing discussion considers seriatim the numerous issues raised by this appeal.

I. *Denial of Fees for Time Spent Litigating Fees*

[1] In completely denying plaintiffs' fees for time spent litigating the fee question after the consent decree, the district court followed two rationales. First, the court construed the consent decree, which provided that "[i]n determining attorney's fees the court will be guided by principles outlined by the Fifth Circuit [in] *Johnson v. Georgia Highway Express, [Inc.]*, 488 F.2d 714 [5th Cir.] 1974)," as precluding fees for time litigating fees because *Johnson* did not contemplate the award of such fees. This is simply a misreading of *Johnson*. That case concerned the factors a court should consider in determining the proper amount of an award. It did not concern the stages of litigation for which any attorney's fees may be awarded. Thus the consent decree's reference to *Johnson*, we believe, had nothing to do with the propriety of awarding fees for litigating over fees. Such an award is authorized by the case law, *Johnson v. Mississippi*, 606 F.2d 635, 637-39 (5th Cir. 1979), and plaintiffs did not waive this right.

The second ground given by the district court for denying any award of fees for time spent litigating the fees question, in essence that plaintiffs were completely to blame for the additional litigation, is not supported by the record or the law. Defendants did not make an offer of judgment until nearly eight months after the consent decree became final. Plaintiffs were entitled to a hearing to resolve any disputed issue of fact. *King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980). Assuming their claim was in good faith, which cannot be denied on this record, they cannot be penalized for exercising that right.

II. *Reduction by One-Third of "Reconstructed" Time*

Pursuant to interrogatories and the district court's request for substantiation of time incurred, plaintiffs' counsel submitted contemporaneous billing records for the vast majority of hours worked. Attorney Reeves, however, did not have contemporaneous records for the 100 hours she claimed to have worked. According to her testimony at the hearing, she reached the 100-hour figure based on diary entries and work product found in her files. The district court cut the hours by one-third for failure to maintain contemporaneous records.

[2, 3] The district court did not have to accept Reeves' claim of 100 hours as true, just as it would not have had to do so if the assertion had been supported by contemporaneous billing records. However, while the burden to substantiate a fee is on plaintiff's counsel, *see Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1371 (5th Cir. 1979), Reeves' testimony and secondary documentation supports her claim. The lack of contemporaneous records does not justify an automatic reduction in the hours claimed. *See Harkless v. Sweeny Independent School District*, 608 F.2d 594, 597 (5th Cir. 1979) (affirming award despite absence of time records).

III. *Deletion of Time Spent by Out-of-Town Counsel Due to "Unnecessary Duplication"*

[4] The district court excluded some of the work time spent by defense counsel based on a finding "of unnecessary duplication of effort and time due to the association of the two attorneys from Mobile." The court also deleted all of the time incurred by the two attorneys traveling to Birmingham, the site of the trial litigation. The present limited finding and the existing record does not sustain this reduction. The district court has failed to specify any instances of duplicative effort, so it cannot be determined whether any reduction for duplication is warranted. *See Tasby v. Estes*, 651 F.2d 287, 289-90 (5th Cir. 1981) (quoting *Northcross v. Board of Education*, 611 F.2d

624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980)).

[5, 6] The retaining of multiple attorneys in a significant, lengthy employment discrimination case such as this is understandable and not a ground for reducing the hours claimed. The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work. While *Johnson* recognizes the possibility of unnecessary duplication for which double compensation should not be granted, 488 F.2d at 717, a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work. An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation. *Ward v. Kelly*, 515 F.2d 908, 912 n. 11 (5th Cir. 1975). *See also Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1188 (11th Cir. 1983).

[7] Since plaintiffs had the right to retain more than one attorney, the exclusion of out-of-town counsel's travel time is proper only if it was unreasonable not to hire qualified local counsel. *Cf. Dowdell*, (travel expenses may be recoverable); *McPherson v. School District # 186*, 465 F.Supp. 749, 758 (S.D. Ill. 1978) (compensating out-of-town counsel for travel time to litigation site but at lower rate). We note that "civil rights litigants may not be charged with selecting the nearest and cheapest attorney." *Dowdell*, 698 F.2d at 1192.

IV. *Exclusion of Evidence (Restriction on Discovery) of Defendants' Fees and Expenses in this Case*

Pursuant to a defense motion, the district court quashed a subpoena sought by plaintiffs requiring the defendants to produce all records showing the hours expended by counsel, expenses incurred, and fees paid. The court reasoned, among other things, that this defense information was irrelevant to the reasonable fees and hours of plaintiffs' counsel. The court reaffirmed its position at the evidentiary hearing, sustaining a

defense objection to questions concerning the fees charged in this case by defense counsel. The court also refused to admit into evidence, except in regard to expenses, the billing statements of defense counsel in this case, which plaintiffs had obtained in related state litigation. Without objection, however, plaintiffs did inquire about the hourly rate billed by a lead defense counsel, John J. Coleman, Jr.

[8] Without suggesting that it would have been error to admit such evidence, we cannot hold that the district court abused its discretion in quashing the subpoena or in sustaining the objection at the hearing in this case. This Court has questioned the relevance of the number of hours spent by defense counsel to a determination of the reasonable fee for plaintiffs' attorneys. *Harkless v. Sweeny Independent School District,* 608 F.2d at 598. The amount of hours that is needed by one side to prepare adequately may differ substantially from that for opposing counsel, since the nature of the work may vary dramatically. The case may have far greater precedential value to one side than the other. *Mirabal v. General Motors Acceptance Corp.,* 576 F.2d 729, 731 (7th Cir.), *cert. denied,* 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978). With respect to the hourly rate, one side may employ far more experienced counsel. Of course, a district court might properly determine in a given case that these concerns merely go to the weight of the evidence, not to its admissibility or discoverability. *See, e.g., Stastny v. Southern Bell Telephone & Telegraph Co.,* 458 F.Supp. 314, 318 (W.D.N.C. 1978) (deeming fees and expenses of defense counsel relevant to determining reasonable award for plaintiffs' counsel), *rev'd in part on other grounds,* 628 F.2d 267 (4th Cir. 1980). But we cannot conclude that the district court abused its discretion here.

Plaintiffs had many avenues to obtain evidence to support their fee petition. Plaintiffs submitted numerous affidavits from other local attorneys concerning their customary fee for litigation-related work. Other affidavits from attorneys discussed the reasonableness of the fee request. In addition, the court allowed plaintiffs to submit much information concern-

ing defense fees. The court advised plaintiffs at the hearing that they could inquire about defense counsel's customary fee, just not their fee in this particular case, and plaintiffs were able to question one defense attorney about the hourly rate he charged in this case.

V. *Striking of Plaintiffs' "Acceptance" of Defendants' Offer of Judgment*

In July 1980, eight months after the consent decree became effective and more than a month before the fee hearing, the defendants submitted pursuant to Fed.R.Civ.P. 68 a formal offer "to allow judgment to be taken against [them] in this action in the amount of $75,000 for attorney's fees, expenses and costs." Plaintiffs purported to accept the offer, but stated that the acceptance only settled the fees and expenses for work done prior to January 15, 1980, the day they filed their outstanding motion for fees and expenses incurred through January 14. In other words, plaintiffs' acceptance did not cover their claim for fees incurred while litigating the fees issue or any fees incurred in the future to enforce the consent decree. Defendants immediately filed a motion to strike the "acceptance," which the district court granted, directing the clerk not to accept a judgment "inconsistent" with the offer. Plaintiffs did not file a second, broader acceptance, and the offer expired pursuant to Rule 68.

[9] This issue turns on defendants' intent in making the offer. Under elementary principles of contract law, an offeree cannot accept a different offer from that made by the offeror. There must be a meeting of the minds. *See Cruz v. Pacific American Insurance Co.*, 337 F.2d 746, 749 (9th Cir. 1964); *Greenwood v. Stevenson*, 88 F.R.D. 225, 230 (D.R.I. 1980).

[10] On appeal, plaintiffs assert error in the striking of their acceptance of the offer. The district court's determination that the acceptance and offer were inconsistent is not clearly erroneous. The offer nowhere indicated that it encompassed only costs and fees incurred prior to the January 15 motion. To the contrary, the language seems all encompassing.

VI. *Exclusion of Computer Expenses*

[11] The district court completely denied nearly $3,000 worth of "computer services" allegedly incurred by plaintiffs, reasoning that plaintiffs failed to explain the nature of the services as required by a court order directing plaintiffs to substantiate all claimed expenses with "invoices, evidence of payment, and reason for the expense." In response to the order, plaintiffs submitted ledger sheets which reflected various costs, including computer expenses, and furnished defendants with invoices. While they never provided any explanation for the costs, one of their attorneys at the hearing voiced her willingness to explain the computer costs then. Inexplicably, neither defense counsel, who was questioning plaintiffs' attorney at the time, nor the court requested that she do so.

Given that plaintiffs furnished invoices and ledgers, and agreed to explain the expenses, they obeyed the court order in substantial part. While the ledger entries may not have supported all of the claimed expenses, as defendants assert, this does not justify the court's complete denial of expenses. The district court rendered its decision 13 months after the hearing, and we conclude that the court overlooked the plaintiffs' compliance with the court order. On remand, the court should reconsider whether any or all computer costs are recoverable in this case. The test, as always, is one of reasonableness. "[W]ith the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs. . . ." *Dowdell*, 698 F.2d at 1192.

VII. *Hourly Rate*

[12] The district court set an identical hourly rate for each of plaintiffs' attorneys, with the rate increasing each year of the litigation to reflect greater experience and increases in customary fees. The rates determined by the court were as follows:

1974	$35.00
1975	$40.00
1976	$45.00
1977	$55.00
1978	$58.00
1979	$60.00
1980	$65.00

These figures, while less than those requested by plaintiffs, were in accord with substantial evidence as to customary fees of equally experienced local counsel. Without going into unnecessary detail, a few examples of the supporting evidence are helpful. A former President of the Birmingham Bar Association with experience in Title VII litigation, James Barton, testified that during the seven year period of this litigation a "very experienced and well-qualified attorney" could charge between $50 and $80 per hour, with a less experienced attorney of 10 years or less in practice charging $35 to $50 an hour. All of plaintiffs' counsel were in their first ten years of practice for most if not all of the litigation. Mr. Barton termed plaintiffs' request "far outside the range of fees generally charged" in Title VII work. A survey by the Alabama Bar Association showed the average billing rate in 1978 in Jefferson County, which includes Birmingham, to be $57.68. The majority of those surveyed had been admitted as long as plaintiffs' most senior attorney. While plaintiffs introduced some evidence supporting their petition, the rates set by the court were not clearly erroneous.

As it should have, the court considered all of the *Johnson* factors, indicating how, if at all, each influenced the fee award. *Fitzpatrick v. IRS*, 665 F.2d 327, 332-33 (11th Cir. 1982); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 582-84 (5th Cir. 1980). On appeal, plaintiffs complain in particular about the court's application of two of the factors: undesirability and contingency.

The district court determined this significant civil rights litigation could not be deemed undesirable to attorneys whose

practice in large measure consists of plaintiffs' civil rights work. *Norwood v. Harrison,* 410 F.Supp. 133, 142 (N.D. Miss. 1976), *aff'd,* 581 F.2d 518 (5th Cir. 1978). Indeed, the success of counsel in this case may very well generate other representations in similar cases. The district court cannot be reversed because of its handling of this *Johnson* factor.

[13, 14] The district court enhanced the fee by 10 percent based on its contingent nature. Since no compensation is guaranteed in a contingency case, an enhancement for successful counsel may be appropriate. *Jones v. Diamond,* 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc). District courts, however, do not have to adjust every fee upward because of a contingent fee. *Marion v. Barrior,* 694 F.2d 229, 231-32 (11th Cir. 1982). The decision that enhancement is appropriate in this case appears sound. But as to the amount of enhancement the district court apparently based the 10 percent figure on its perception that plaintiffs' counsel was receiving payments from the Lawyer's Committee for Civil Rights for this representation. This Court has held that an award of attorney's fees should not be reduced simply because counsel is receiving some compensation from third parties. *Ward v. Kelly,* 515 F.2d at 912 n. 11; *Thompson v. Madison County Board of Education,* 496 F.2d 682, 689 (5th Cir. 1974); *see Fairley v. Patterson,* 493 F.2d 598, 606-07 (5th Cir. 1974).

VIII. *Failure to Consider Delay in Payment*

[15] The district court awarded the plaintiffs historical rates, reflecting the reasonable fee at the time the work was performed, apparently without any enhancement for delay in payment. Such delay obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one. As a result, district courts should take into account inflation and interest, perhaps by adjusting the contingency factor to reflect delay, not just contingency, or perhaps by compensating at current, not historical, rates. *See Copeland v. Marshall,* 641 F.2d 880, 893 (D.C.Cir. 1980) (en banc); *Northcross v. Board of Education,* 611 F.2d 624, 640 (6th Cir. 1979), *cert.*

denied, 447 U.S. 911, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980). We do not prescribe any set method for correcting for delay in payment, but some form of correction must be undertaken. The district court should do so on remand. If this requires a reevaluation of the historical hourly rates, the district court is free to approach the delay problem in that manner. *See Morgado v. Birmingham-Jefferson County Civil Defense Corps,* Slip op. p. 3366 at 3377, F.2d ____ (11th Cir. 1983) [No. 81-7282].

IX. *Conclusion*

This nation has sought to protect citizens' most basic, cherished rights and liberties by enacting a plethora of civil rights laws. Congress recognized in the Fees Act and in Title VII, however, that effective enforcement of those laws depends to a large extent upon the action of private citizens, not just governmental officials. *See* H.Rep. No. 238, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2147-48. It also perceived that most victims of civil rights violations lacked the resources to obtain the legal counsel necessary to vindicate their rights through the judicial process. H.R.Rep. No. 1558, 94th Cong., 2d Sess. (1976). Adequate fee awards are essential to the full enforcement of the civil rights statutes and are an integral part of the remedies necessary to secure compliance with those laws. S.Rep. No. 1011, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5911. The standards and principles underlying the Fees Act and the fee provisions of Title VII are the same. *See id.* at 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5912; *Salone v. United States,* 645 F.2d 875, 879 (10th Cir. 1981).

Congress further recognized that effective enforcement of civil rights laws depends on fee awards sufficient to attract competent counsel without producing a windfall to the attorneys. To this end, it explicitly expressed its intent that the "amount of fees awarded [under the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . .", and that fee computations result in payments, "as is traditional with attor-

neys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " S.Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913 (quoting *Davis v. County of Los Angeles*, 8 Empl.Prac.Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) and *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 684 (N.D.Cal. 1974)). This Court has recognized that "the standard of reasonableness is to be given a liberal interpretation." *Dowdell*, 698 F.2d at 1192.

The procedures for applying the *Johnson* standards, which were cited with approval in the legislative history to the Fees Act, S.Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913, have been set out in numerous cases such as *Fitzpatrick v. IRS*, 665 F.2d at 332-33, and *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d at 583 & n. 15. As most attorney's fees cases demonstrate, application of these principles should result in a reasonable fee which meets the goals of the statutes. In the last analysis, however, the fulfillment of the congressional purpose depends upon the ultimate judgment of the district court, not just the mechanical application of established principles. This case entailed eight years of litigation resulting in the successful vindication of important rights. The voluminous record reveals that plaintiffs' attorneys confronted complicated factual and legal issues as well as a group of defendants who staunchly resisted their efforts at almost every turn. Despite these obstacles, they attained a significant victory and established a mechanism for ensuring that defendants' future employment actions comport with the civil rights laws. The fees awarded to plaintiffs' attorneys should reflect the congressional purpose in enacting the Fees Act and Title VII.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARTHA JOHNSON and DOLORES CEBALLOS; et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 74-G-1378-S
UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; et al., Defendants.	)	

MEMORANDUM OPINION

This cause is before the court upon motion of plaintiffs for award of attorneys' fees and costs dated February 13, 1980, pursuant to the consent decree filed October 29, 1979, and approved November 21, 1979. A full evidentiary hearing on the issue of attorneys' fees and costs was held in this cause on August 27-28, 1980. By order of this court, interim fees were granted in the amount of $50,000.00 to the firms of Reeves and Still, and Blacksher, Menefee & Stein, and $1,250.00 to Michael Crespi.

The parties expressly adopted the standards in the Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in the consent decree of October 29, 1979, to govern the fee determination. Consent Decree, Para. 8. Accordingly, the exclusive focus by this court is on the twelve factors discussed in *Johnson*.

1. *Time and Labor Required:*

The time and labor reported by counsel in the cause reveal the following hours:

	Hours	
Mr. Crespi	68.65	hours
Mr. Still	39.2	hours in-court time[1]
	300.9	hours out-of-court time
Mr. Blacksher	5.5	hours in-court time
	86.5	hours out-of-court time
Mr. Menefee	5.5	hours in-court time
	220.1	hours out-of-court time
Ms. Reeves	30.45	hours in-court time
	603.96	hours out-of-court time

The first issue before this court is whether to allow counsel to recover compensation for the attorney fee litigation; the hours claimed in the above chart do include hours expended in pursuit of the attorney fee claim.

The court in *Johnson v. Georgia Highway Express,* the case referred to in the consent decree to set the parameters of the attorney fee award, referred only to the time and labor required to litigate the case on the merits and neither refers to nor implies the possibility of compensation for attorney fee litigation. The question of compensation for attorney fee litigation was not considered by the Fifth Circuit until *Johnson v. Mississippi,* 606 F.2d 635 (5th Cir. 1979), which was decided November 16, 1979, after entry of the consent decree in this case. The court in *Johnson v. Mississippi* expressly stated that the issue had not been determined before by the Fifth Circuit. *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir. 1979). Accordingly, when the parties to this action agreed to accept a fee based on the *Johnson v. Georgia Highway Express* principles, the parties did not contract nor contemplate that such an award would include time expended in litigating the attorney fee question.

[1]In-court time occurred on 6/27/77, 6/30/77, 7/5/77, 12/20/77, 8/20/80 and 8/28/80, according to Agreed Statement No. 6. Because Ms. Reeves' records reveal that the hearing on 8/27/80 lasted for 5.5 hours, that amount of time is used for all parties, although some of the other attorneys had more time accredited to the hearing and preparation.

Additionally, it was the plaintiffs that requested the evidentiary hearing which brought into play the full panoply of discovery. It seems inequitable to pay the plaintiffs a premium because they brought on additional litigation after the consent decree, including time spent filing motions that appear extraneous and unnecessary. Accordingly, the hours for each attorney should be limited as follows:

	Hours
Mr. Crespi	52.85 hours
Mr. Still	31.7 hours in-court-time
	177.25 hours out-of-court time
Mr. Blacksher	79.7 hours out-of-court time
Mr. Menefee	177.4 hours
Ms. Reeves	22.2 hours in-court time
	533.66 hours out-of-court time

In addition to the reduction for time spent on litigating the attorney fee issue, the court also feels that it should reduce by one-third (33⅓ percent) the time that has been "reconstructed" due to counsel's failure to keep accurate time records, even though counsel were aware that any fee claim would have to be justified by presentation of accurate time records. The burden of proving the reasonableness of a fee request is on the plaintiffs. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) Thus, the hours of counsel that reconstructed some of their time should be reduced as follows:

		Hours
Mr. Crespi	52.85 × 66⅔% =	35.23 hours
Ms. Reeves	22.2 × 66⅔% =	14.80 in-court hours
	88.98 × 66⅔% + 444.68 =	503.99 hours out-of-court time

Furthermore, this court finds that there was unnecessary duplication of effort and time due to the association of the two attorneys from Mobile, Mr. Blacksher and Mr. Menefee. While it may be argued that Mr. Still, who is an excellent trial lawyer in the field of Title VII litigation, did not need the counsel from Mobile, defendants have condeded that Mr. Blacksher and Mr. Menefee's expertise in a similar case may have contributed to this cause and have only requested a reduction in hours that are clearly duplicative. Other hours that are excluded, in the exercise of the discretion of the court, are: (1) hours spent by Ms. Reeves to secure financing of co-counsel, (2) traveling time to and from Birmingham by Mr. Blacksher and Mr. Menefee, (3) performance of clerical tasks by Mr. Still and Ms. Reeves, and (4) time spent obtaining and reviewing statements for legal fees rendered to defendant by defendant's counsel in the *Johnson v. Hill* litigation in state court, after this court had ruled that such information was not relevant. The exclusion of these hours provides each attorney with the following hours after the other reductions:

	Hours
Mr. Crespi	35.23 hours
Mr. Still	25.7 hours in-court time
	157.25 hours out-of-court time
Mr. Blacksher	72.7 hours
Mr. Menefee	157.4 hours
Ms. Reeves	8.8 hours in-court time
	459.0 hours out-of-court time

2. *The novelty and difficulty of the questions.*

The court did not find this case to involve any novel or unusually difficult questions of law. Sufficient precedent existed in the Title VII area to guide counsel, although the unique organizational structure of the University College did not make this a simple case.

3. *The skill requisite to perform the legal service properly.*

Johnson states that the trial court is uniquely able to judge the novelty of the issues and the skill of the lawyers, based on its own observation and experience. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). Any special consideration of legal skills is proper only when counsel's quality of performance is notably below or above that of the average competent attorney in the same type case. *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), cited in *Lindy II*, 540 F.2d 102, 117 (3d Cir. 1976). Accordingly, this court finds that the fee award should not be increased or decreased due to this factor.

4. *The preclusion of other employment by the attorney due to acceptance of the case.*

There was no evidence presented to the court of any employment that was turned down by counsel in the cause due to this litigation; accordingly, this factor will not be used by the court to enhance the fee award.

5. *The customary fee.*

Before any enhancement, counsel for the plaintiffs have suggested the following hourly rates:

Mr. Crespi	—	$40.00	
Mr. Still	—	$87.50	in-court
		62.50	out-of-court
Mr. Blacksher	—	$62.50	
Mr. Menefee	—	$62.50	
Ms. Reeves	—	$87.50	in-court
		62.50	out-of-court

After enhancement, the plaintiffs suggest that the hourly rates should be $112.50 for out-of-court time and $150.00 for in-court time. These proposed hourly rates are excessive.

Without addressing the question of enhancement, this court would first point out that it is inappropriate to apply 1980 customary rates to all years during which plaintiffs' counsel worked on this lawsuit. This court prefers to determine the fee on an annual basis, applying the hours worked each year to the customary fee that year.[2]

According to the evidence presented to the court, the average customary rates in Birmingham for attorneys with experience similar to that of Ms. Reeves, Mr. Still, Mr. Blacksher, and Mr. Menefee would appear to be: 1974 - $35.00, 1975 - $40.00, 1976 - $45.00, 1977 - $55.00, 1978 - $58.00, 1979 - $60.00, and 1980 - $65.00. Consistent with this determination, the attorneys' fees would be as follows:

Ms. Reeves

1974:	98.3	× $35.00	=	$3,440.50	
1975:	191.7	× $40.00	=	7,668.00	
1976:	25.8	× $45.00	=	1,161.00	
1977:	35.7	× $55.00	=	1,963.50	
1978:	15.5	× $58.00	=	899.00	
1979:	93.0	× $60.00	=	5,580.00	
1980:	7.8	× $65.00	=	507.00	
					$21,219.00

Mr. Still

1976:	7.0	× $45.00	=	$ 315.00	
1977:	94.0	× $55.00	=	5,170.00	
1978:	16.65	× $58.00	=	965.70	
1979:	62.65	× $60.00	=	3,750.00	
1980:	3.4	× $65.00	=	221.00	
					$10,421.70

[2]However, with respect to Mr. Crespi's fee request, the parties have agreed to a $40.00 an hour *composite* rate for the years in which Mr. Crespi participated, 1974 to mid-1976.

Mr. Blacksher

1976:	27.0	× $45.00	=	$1,215.00	
1977:	14.0	× $55.00	=	770.00	
1978:	17.5	× $58.00	=	1,015.00	
1979:	14.2	× $60.00	=	852.00	
					$ 3,852.00

Mr. Menefee

1976:	59.0	× $45.00	=	$2,655.00	
1977:	89.0	× $55.00	=	4,895.00	
1978:	3.0	× $58.00	=	174.00	
1979:	6.4	× $60.00	=	384.00	
					$ 8,108.00

Mr. Crespi

35.23 × $40.00 = $1,409.20

The court did not differentiate between in-court and out-of-court hourly rates or other differentiations between rates for tasks performed, but the court chose instead to use an average hourly rate.

6. *Whether the fee is fixed or contingent.*

It is noted by this court that a district court is required to consider, in setting attorneys' fees, whether the fee is fixed or contingent. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). However, the predominant number of Title VII cases which follow the *Johnson* principles have not granted *any* premium for contingency; the only such case in this circuit cited to this court, *Martin v. University of South Alabama*, Dk. No. 75-0473-P (S.D. Ala. 1978), only added a ten percent enhancement, a percentage by which this court plans to enhance the base amounts.

The contingency nature of this action was reduced by the payments made to Ms. Reeves by the Lawyers Committee in the years 1974, 1975, and 1976. These payments made the financial risk minimal.

It is noted by this court that plaintiffs attempt to justify the association of Mr. Menefee and Mr. Blacksher on the basis that their association spread the financial burden and risk. This argument is rejected by the court; an increased number of lawyers does not spread the risk.

7. *Time limitations imposed by the client or the circumstances.*

Plaintiffs have made no claims of any burdens caused by unusual time pressures in this court.

8. *The amount involved and results obtained.*

This court is aware that this circuit has held that a court does not have to sever an attorney's work into issue parcels to determine the successful claims for purposes of a fee award. *Miller v. Carson,* 628 F.2d 346, 348 (5th Cir. 1980). Plaintiffs were obviously successful in most of their claims. Also, it is improper to tie the attorneys' fee award to the financial relief awarded the plaintiffs. *Harkless v. Sweeny Independent School District,* 608 F.2d 594 (5th Cir. 1979).

However, in examining the results obtained in this cause, the court must note that only *five* individuals out of the potential class of 112 (excluding the two named plaintiffs) have sought to advance a claim. This lack of interest by the class precludes this litigation from being characterized as "watershed litigation."

9. *The experience, reputation and ability of the attorneys.*

Ms. Reeves was admitted to practice law in 1967. Between 1967 and 1973, Ms. Reeves was employed by the University of Alabama, the Department of Agriculture, and the Department of Justice. She has been in the private practice of law since the fall of 1973, at which time she was associated with the Lawyers' Committee for Civil Rights Under Law.

Mr. Still was admitted to practice law in August 1971, and has been in the private practice of law since that time. This

court is well aware of Mr. Still's excellent abilities as a trial lawyer in Title VII litigation.

Mr. Blacksher was admitted to practice law in 1971 and served as a federal judicial law clerk from January to December 1971. Since January 1972, he has engaged in the private practice of law.

Mr. Menefee was admitted to practice law in August 1971. From August 1972 to August 1973 he served as a law clerk to a federal judge and has been engaged in the private practice of law since August 1973.

It is noted by this court that counsel's experience and ability has increased over the period of this case; this experience and ability necessarily was less in 1974 than it is today. This fact lends further support to the court's award of different hourly rates for different years.

10. *Undesirability.*

The attorneys involved in this cause are well-known members of the plaintiffs' civil rights bar in this state. The nature of their practice would not lead this court to assume that they feel such cases as this one to be undesirable; on the other hand, their success in this cause should benefit them in securing future employment.

11. *Nature and length of relationship with client.*

The plaintiffs' counsel in this cause have not had any significant professional relationship with any of the clients in this cause outside of this action; thus, no facts have been asserted which should affect the fee in this regard.

12. *Awards in similar cases.*

This court feels that an enhancement of ten percent is appropriate in this cause due to the factors outlined above and similar cases in this district.

In the case of *James v. Stockham Valves & Fittings Co.*, Dkt. No. 70-G-0178-S, this court allowed an enhancement of 25 per-

cent; however, that action was totally contingent, watershed, and provided new authority and new law in the field.

In a recent sex and age discrimination case, *Jones v. Cleland*, 466 F. Supp. 34 (1978), which involved novel issues of law and questions of first impression, affirmed by the Fifth Circuit on June 6, 1980, this court awarded an attorney's fee calculated at the rate of $75.00 per hour to an attorney of 25 years experience, scarcely more than the rate in this cause after enhancement, and this cause did not involve any novel issues.

Furthermore, this court recently awarded William F. Gardner, who has a national reputation in the field of employment discrimination and over 20 years experience, only $75.00 an hour in a Title VII case which involved six years of litigation and over 1,200 hours of preparation. *Perry v. EEOC*, Dkt. No. 75-G-1476-S (N.D. Ala. December 16, 1980).

The award in this cause as calculated herein, plus a ten percent enhancement, totals $47,960.77 to the law firm of Blacksher, Menefee & Stein and the firm of Reeves and Still, and $1,550.12 to Michael Crespi.

The expense claims of each attorney are outlined below:

Mr. Crespi		
Postage and other incidental expenses (Motion for Award of Attorney's Fees, May 12, 1980)		$ 15.00
Ms. Reeves		
Long distance calls to Charlotte Gafford, Blacksher and Menefee, and Department of Justice	$ 12.50	
Telephone	6.22	
Xerox Copying	275.50	
Perez Deposition	613.80	
Mailing Costs	95.00	
Publications	3.50	
TOTAL		$ 1,006.52

Mr. Still		
Telephone:		
October 1976 - March 1980	$ 648.40	
April 1980 - July 1980	130.07	
August 1980	45.50	
Statistical Clerk, May 1977	25.30	
Service of Subpoenas, June 30, 1977	20.00	
Printing Class Notices, February 23, 1979	57.71	
Post Cards for reminder notices, April 9, 1979	16.25	
Paralegal: Inspection of records produced by UAB, 9 hours at $4	36.00	
Paralegal Research, 6.5 hours at $4	26.00	
Copy Costs: 1976 - March 1980	302.55	
April - July 1980	103.50	
August 1980	72.75	
Filing Fee, *Johnson v. Hill*	37.00	
PIP, printing	10.81	
TOTAL		$ 1,924.34
Mr. Blacksher and Mr. Menefee[3]		
Telephone:		
Through 12/6/79	$ 464.56	
1/14/80 - 7/31/80	117.72	
8/1/80 - 9/22/80	19.40	
Xeroxing Costs:		
Through 1/6/79	403.75	
1/14/80 - 7/31/80	11.75	
8/1/80 - 9/22/80	58.50	
Court Costs	121.80	
Computer Services	2,795.37	
Expert Witnesses	8,997.44	

[3]The expenses through December 1979 appear on Mr. Menefee's affidavit of August 14, 1980. The 1980 expenses are listed in Mr. Menefee's affidavits of August 4, 1980, and September 22, 1980.

Travel Expense:		
Through 12/6/79	905.95	
8/1/80 - 9/22/80	284.06	
Postage Expense:		
Through 12/6/79	17.53	
1/14/80 - 7/31/80	2.78	
8/1/80 - 9/22/80	1.05	
Deposition Expense, 1980	44.85	
Expert Witness, 1980	25.00	
TOTAL		$14,270.79

These costs are adjusted by this court in the following respects:

(1) All xeroxing will be charged at $0.10 per page rather than the $0.15 claimed by Mr. Still and $0.25 per page claimed by Menefee and Blacksher. Ms. Reeves' charges are discounted 33⅓ percent due to her failure to substantiate her claim with any records.

(2) Paralegals' time, since it is treated as a cost, will be reimbursed at the rate at which the cost was incurred by the attorney, i.e., $3.00 an hour, rather than the requested $4.00 an hour rate.

(3) The filing fee of $37.00 for *Johnson v. Hill* is excluded, since that case was filed to obtain information that this court had already ruled to be irrelevant.

(4) All of the long distance phone calls by Mr. Menefee and Mr. Blacksher are excluded as they are unsupported by any documentation and, more importantly, these costs would not have been incurred if local counsel had been associated rather than counsel from Mobile.[4] In addition, the Birmingham-Mobile telephone calls by Mr. Still and Ms. Reeves are excluded as unnecessary expense.

(5) Travel expenses by Mobile counsel are denied.

[4]The whole telephone expense incurred by Mr. Menefee and Mr. Blacksher is excluded since there are no records to determine which calls were made to Birmingham.

(6) The expert witness fee of $25.00 and the 1980 deposition expense of $44.85 claimed by Mr. Menefee and Mr. Blacksher are denied as they appear to relate to Dr. Schlichting, whose testimony at the attorneys' fee hearing was highly irrelevant.

(7) All computer costs designated as "computer services" are denied as counsel have failed to explain the nature of services as required by the order of this court, adopting the magistrate's recommendation, that such costs be further explained.

(8) The $121.08 claimed court costs by Menefee and Blacksher are denied as they are unidentified, contrary to this court's order adopting the magistrate's recommendation.

(9) Finally, the payment to Ms. Reeves by Mr. Menefee and Mr. Blacksher of $315.00, allegedly in payment of 15 witness fees, is reduced to $273.00, as only 13 subpoenas are in the court record. These calculations allow the following costs to remain:

Mr. Crespi		
Postage and other incidental expense[5]	$15.00 × 66⅔% =	$10.00
Ms. Reeves		
Telephone	$ 6.22	
Xerox copying[6]	122.43	
Perez deposition	613.80	
Mailing costs	63.33	
Publications	2.33	
TOTAL		$ 808.11
Mr. Still		
Telephone	$ 401.54	
Statistical clerk	25.30	

[5]This amount, although nominal, is also reduced by 33⅓% as it has not been substantiated by any records.

[6]This amount was reduced (1) by 33⅓% due to lack of records, and (2) to a $.10 charge per page.

Service of subpoenas	20.00	
Printing class notices	57.71	
Post cards for reminder notices	16.25	
Paralegal research	46.50	
PIP, printing	10.81	
Copy costs	379.68	
TOTAL		$ 957.79
Mr. Blacksher and Mr. Menefee		
Xeroxing	$ 166.20	
Expert witnesses	8,997.44	
Postage expense	21.36	
TOTAL		$ 9,185.00

In accordance with the above calculations, this court awards costs in the amount of $10,222.90 to the firms of Reeves and Still and Blacksher, Menefee & Stein, and $10.00 to Michael Crespi.

In their original application plaintiffs did not ask for interest. Their "Motion to Amend Request for Attorneys' Fees," filed August 13, 1981, calls for enhancement based on increase in the Consumer Price Index, and their letter brief of August 12, 1981, cites cases in support of an interest award. However, the holding in *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), makes it clear that an interest award is discretionary with the court and, in footnote 16, that an application which comes too late can be denied. This application came entirely too late and is denied. No authority exists for enhancement based on the Consumer Price Index. Consequently, this application is denied both for lack of merit and for being untimely.

Furthermore, plaintiffs contracted for a particular thing, in adopting the standards of *Johnson v. Georgia Highway Express, supra*. That case does not allow attorneys' fees for time spent litigating the issue of attorneys' fees, nor does it allow interest thereon. Neither does it even discuss these two issues. Plaintiffs have contracted away any right they might have obtained under later cases by their contractual adoption of the *Johnson*

standards. The contract must be interpreted to call for fees based strictly on *Johnson* as it was interpreted at the time the contract was executed—not as it might have been either liberalized or restricted by later judicial interpretation.

There are other equitable grounds which militate against granting either of these untimely enhancement requests. On July 23, 1980, plaintiffs filed with the court an "Acceptance of Offer of Judgment," which the court subsequently ordered stricken and held for naught as not unconditional and therefore inconsistent with the defendants' offer. The court further ordered that defendants' $75,000.00 offer would expire in accordance with Rule 68, Federal Rules of Civil Procedure, unless timely and unequivocally accepted. Although the filing with the Clerk of plaintiffs' "Acceptance of Offer of Judgment" was improper under Rule 68, nevertheless, because it was in fact filed, the court became aware that plaintiffs lost the use of this money after receipt of the Offer of Judgment only because they rejected defendants' offer. Thus, as a matter of equity and good conscience, they would not be entitled in any event to interest after the offer was made.

Additionally, the court notes that plaintiffs were paid $50,000.00 as interim fees. The amount of the fee award as finally determined is less than $50,000.00, although reimbursement of out-of-pocket expenses does, in fact, bring the total award over that amount. Counsel have not under these circumstances been unduly deprived of the use of the money of the fee award.

For all the foregoing reasons, plaintiffs' motion to amend request for attorneys' fees is denied.

A separate order consistent with this memorandum opinion will be entered contemporaneously herewith.

DONE this the 25th day of September 1981.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE

J. FOY GUIN, JR.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7860

D.C. Docket No. CA74G-1378S

MARTHA JOHNSON AND DELORES J. CEBALLOS, ETC.,

Plaintiffs-Appellants,

versus

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; GEORGE W. CAMPBELL, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

June 10, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7860

MARTHA JOHNSON and DELORES J. CEBALLOS, etc.,

Plaintiffs-Appellants,

versus

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; GEORGE W. CAMPBELL, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING

August 11, 1983

Before RONEY, CLARK and TUTTLE, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-554

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM, et al
Petitioners,

v.

MARTHA JOHNSON AND DELORES J. CEBALLOS, individually and on behalf of others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT

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QUESTION PRESENTED

1. Is this case ripe for review, when the Court of Appeals remanded a fee award proceeding to the district court for reconsideration?

2. Did the Court of Appeals properly remand a fee award proceeding to the district court for reconsideration under correct legal standards?

PARTIES

The original plaintiffs Martha Johnson and Delores J. Ceballos no longer have a monetary interest in the outcome of this case. The real parties in interest are the attorneys who will benefit from the award of fees: Edward Still and Susan Williams Reeves of Reeves & Still, and J. U. Blacksher and Larry T. Menefee of Blacksher, Menefee & Stein, P.A.

The individual defendants were dismissed from the case as a part of the consent decree and have no further interest in the issue of fees. The only proper defendant-petitioner is the Board of Trustees of the University of Alabama.

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STATEMENT OF THE CASE

The respondents brought an employment discrimination action under Title VII of the 1964 Civil Rights Act against the University of Alabama in Birmingham in December 1974. The Court certified a class of past and present female faculty in the School of Humanities in University College. Approximately two weeks before the case was set for trial, the parties informed the Court that an agreement had been reached and filed a joint motion for the entry of a consent decree. The Court gave notice of the proposed decree to the class, held a hearing on the fairness of the settlement, and entered the decree.

In February 1980, the respondents moved for an award of attorneys' fees and gave notice of a deposition of the petitioners to inquire into their attorneys' fees and costs. The petitioners moved to quash this subpoena and the Court did so holding that the requested information was "private and confidential information" and irrelevant under *Johnson v. Georgia Highway Express,* 488 F2d 714 (5th Cir 1974).

When the respondents moved for reconsideration, pointing out that the University was required by Alabama law to make its records available to the public, the Court reaffirmed its ruling and held, "If the information sought is available under state law, it must be sought in state court." The respondents obtained this information in a state court action and introduced it at the federal fee hearing.

The Court, on its own motion, entered an order requiring counsel for respondents to itemize all of the time they had expended, list biographical data for each attorney, and list the expenses claimed. The order also required the respondents to make available "their time records utilized to compile the summary of hours included in plaintiff's motion."

The respondents moved to modify this order by dropping the requirement of producing original time records, explaining that some of the attorneys' time records would reveal information regarding persons and cases not related to this litigation. The Court modified the prior order by allowing other clients' names to be deleted and setting a hearing for six months after the motion for fees was filed.

The respondents took no discovery, but the petitioners filed 15 pages of interrogatories relating to the respondents' attorneys' income, billing practices, similar cases, and the like. The respondents answered these interrogatories and objected to several of them on the grounds, *inter alia*, they would violate the attorney-client privilege of other clients. The petitioners moved to compel answers, and respondents moved for a protective order. The magistrate recommended that rather than having to answer the petitioners' interrogatories to which they objected, the respondents' counsel be required to submit affidavits of their usual hourly fee charges and billing practices in other cases, copies of all their time records, and a "complete justification for each item of expenses" in the instant case. The respondents' counsel filed the required material.

At the hearing on attorneys fees, the Court received several affidavits in support of each side and heard oral testimony.

Three weeks after the hearing (and 10 months after the decree on the merits), the Court ordered the petitioners to pay respondents' attorneys the sum of $50,000 as a partial payment of fees.

A year later, the Court entered its final order awarding an additional sum of $8,183.67 in fees and costs to respondents' attorneys.

REASONS FOR DENYING THE WRIT

I. This case is not yet ripe for review.

The true nature of the petitioners' position is revealed by the timing of the petition. The University is opposed to the very idea that the district court can be instructed as to correct legal principles. The Court of Appeals remanded the case for reconsideration; after the district court recomputes the fee, the petitioners may again seek review in the appellate court and this Court. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 US 327, 328 ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). At this point, the district court may or may not grant a substantial modification in the fee. In any case, this case will present a more manageable, and less abstract, fact situation after the district court revises its fee award in accordance with the mandate of the Court of Appeals.

II. The Court of Appeals correctly held that a district court must substantiate its judgment as to the correct amount of attorneys' fees.

The linchpin of the petitioners' argument regarding the Court of Appeals' opinion is that the appellate court cannot require the trial court to consider — and discuss its consideration of — a uniform set of criteria. While all agree that the standard of review of fee decisions is "abuse of discretion," the petitioners apparently want that discretion unbounded by requirements that the trial court explain the computation or even the factors used. The petitioners would go even further and hold that a decision based on an erroneous understanding or application of the law cannot be corrected on appeal. A *seriatim* analysis of the points of disagreement the petitioners have with the Circuit Court's opinion will reveal the flaws in their position.

1. The district court held that respondents "were obviously successful in most of their claims" but did not achieve a "watershed" victory because few women asked for a review of their particular status after the parties had entered into an affirmative action agreement, Petition A-19. Had the district Judge not taken 6 months to set and hear the attorneys' fee issue, all of the results of class relief would not have been available to affect the fee hearing. The petitioners assert that "the Eleventh Circuit rejected these findings and substituted its own analysis," Petition 4. In fact, the Circuit Court only mentioned the respondents' "significant victory" in passing and did not instruct the trial court to change its findings, Petition A-11.

2. The petitioners would have this Court believe that the Court of Appeals has substituted its own judgment for that of the district court regarding "unnecessary duplication of effort and time due to the association of the two attorneys from Mobile," Petition 5, A-3. The Court of Appeals simply instructed the district court to reconsider its ruling taking into consideration that "a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work," and that "plaintiffs had a right to retain more than one counsel" and for some of the plaintiffs' lawyers to be from another city.[1]

3. The district court held that respondents' attorneys could not be awarded fees for the time they spent on proving their fees and replying to the petitioners' discovery relating to their past income and billings because *Johnson v. Georgia Highway Express, Inc.*, 488 F2d 714 (5th Cir 1974), did not contemplate the award of such fees and be-

[1]The district court made only a conclusory finding on this point, so review was difficult. It should be noted that plaintiffs' attorneys were matched or exceeded in number by defense counsel in all hearings except one short conference before the magistrate.

cause respondents requested an evidentiary hearing.[2] Again, the Court of Appeals instructed the district court as to points of law and remanded for reconsideration, Petition A-2.

4. The petitioners complain that the Court of Appeals "substituted its own judgment" on the matter of the bonus for contingency, Petition 7. The Court of Appeals only instructed the district court that "an award of attorney's fees should not be reduced simply because counsel is receiving some compensation from third parties," Petition A-9.[3] The Court of Appeals was only stating a principle of law, not changing the facts found by the District Court.

5. The petitioners assert that the Court of Appeals should not have reversed the exclusion of respondents' computer expenses, Petition 8. The District Court excluded the computer expenses on the grounds that respondents' attorneys had failed to produce an explanation for the claim for computer expenses, yet the record clearly shows that respondents had complied. The petitioners introduced as exhibits at the hearing copies of the respondents' computer bills they had obtained through discovery. Though each of the respondents' attorneys took the witness stand, the petitioners never asked for an explanation of the bills, which were similar to the bills submitted by the petitioners' expert (and also introduced as an exhibit at the fee hearing).

[2]The district court also found that the respondents' attorneys filed "extraneous and unnecessary" motions relating to the fee hearing, but never specified what motions it meant. The lack of such a specification hampered the respondents' ability to appeal and the appellate court's ability to review the decision for an abuse of discretion. The petitioners' appellate brief listed seven motions they claimed were frivolous. The total time spent by respondents' counsel on these motions was less than 5 hours.

[3]The compensation was only reimbursement for some expenses, not payment for the attorneys' time.

The actions of the Court of Appeals in this are similar to those of this Court in *Hensley v. Eckerhart*, ...US....., 103 SCt 1933, 76 LEd2d 40 (1983). After establishing the correct legal basis for an award of fees, this Court remanded because the district court had not properly considered those legal factors. Under the petitioners' theory, the *Hensley* opinion was deficient because it did not label the actions of the district court as an abuse of discretion and because it instructed the district court as to the correct legal analysis.[4]

III. The Court of Appeals' decision regarding delay in payment of fees is consistent with other circuits.

The Court below held (Petition A-9-10):

> The district court awarded the plaintiffs historical rates, reflecting the reasonable fee at the time the work was performed, apparently without any enhancement for delay in payment. Such delay obviously dilutes the eventual award and may convert an other-

[4]Every Circuit engages in exactly the same process (remanding with instructions as to recomputation) for which the University faults the Eleventh Circuit. *See, e.g., Furtado v. Bishop*, 635 F2d 915 (1st Cir 1980); *Cohen v. West Haven Board of Police Commissioners*, 638 F2d 496 (2d Cir 1980); *David v. City of Scranton*, 633 F2d 676 (3rd Cir 1980); *Bonnes v. Long*, 599 F2d 1316 (4th Cir 1979), cert. denied 455 US 961 (1982); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F2d 575, 581 (5th Cir 1980) ("What we require is not a meaningless exercise in parroting and answering of *Johnson's* twelve criteria, but some assurance that the court has arrived at a just compensation based on appropriate standards."), on reconsideration 701 F2d 542 (1983) (en banc); *Riddell v. National Democratic Party*, 712 F2d 165 (5th Cir 1983) (remanding because of failure to mention in fee award 115 hours claimed by prevailing parties); *Northcross v. Board of Education of Memphis City Schools*, 611 F2d 624, 640-642 (6th Cir 1979), cert. denied 447 US 911 (1980); *Mary and Crystal v. Ramsden*, 635 F2d 590, 601-2 (7th Cir 1980); *Murphy v. Ford Motor Credit Co.*, 629 F2d 556 (8th Cir 1980), *vac. & rem.* (on other grounds) 452 US 957 (1981); *Pate v. Alameda-Contra Costa Transit District*, 697 F2d 870 (9th Cir 1983); *Gurule v. Wilson*, 635 F2d 782, 792-4 (10th Cir 1980); *GAF Corp. v. Transamerica Ins. Co.*, 665 F2d 364 (DC Cir 1981).

> wise reasonable fee into an unreasonably low one. As a result, district courts should take into account inflation and interest, perhaps by adjusting the contingency factor to reflect delay, not just contingency, or perhaps by compensating at current, not historical, rates. See *Copeland v. Marshall*, 641 F2d 880, 893 (DC Cir 1980) (en banc); *Northcross v. Board of Education*, 611 F2d 624, 640 (6th Cir 1979), cert. denied, 447 US 911, 100 SCt 3000, 64 LEd2d 862 (1980). We do not prescribe any set method for correcting for delay in payment, but some form of correction must be undertaken. The district court should do so on remand. If this requires a reevaluation of the historical hourly rates, the district court is free to approach the delay problem in that manner.

The petitioners claim that this holding is inconsistent with decisions of the Sixth and District of Columbia Circuits. While those Circuits have held that adjustments for delay or inflation are discretionary, the Eleventh Circuit has recognized that a delay in payment works a significant disadvantage to attorneys working on a contingent basis. To be paid in 1981 on the basis of earlier years' rates with no adjustment for the delay in payment discourages attorneys from undertaking complex litigation. In the antitrust field, courts have recognized this fact and have awarded fees adjusted for delay in payment. See, *In re Ampicillin Antitrust Litigation*, 81 FRD 395, 402 (DDC 1978); *In re Folding Carton Antitrust Litigation*, 84 FRD 245, 267 (ND Ill 1979); *Aamco Automatic Transmissions, Inc. v. Taylor*, 82 FRD 405 (ED Pa 1979); *Knutson v. Daily Review, Inc.*, 479 FSupp 1263 (ND Cal 1979).[5]

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[5]The petitioners contend that the delay in this case was "only" four years, yet in 1981 the median time between filing and final disposition after trial of civil cases was 20 months; only ten percent of those civil cases took longer than 48 months. Administrative Office of the United States Courts, *1981 Annual Report of the Director*, Table C5. Sixteen percent of the cases over three years old on 30 June 1981 were civil rights

Because of this delay and the contingent nature of this type of case, attorneys who undertake civil rights cases are taking both a significant risk and a cut in short-term income. This risk is a proper factor to weigh in setting adequate compensation for the attorney who succeeds.

IV. The Court of Appeals properly reversed the District Court on the issue of "reconstructed time."

The district court deducted 37.06 hours from one attorney's fee request because 111 hours of her time was not contemparaneously recorded on a standard time sheet. Ms. Reeves testified that she had spent the 111 hours on pleadings and correspondence and had deliberately underestimated the time that she spent by claiming time only if there was a work product (such as correspondence or a pleading) sent out of the office. She claimed no such reconstructed time for any conferences, research, telephone calls, or the like. The petitioners admitted that Ms. Reeves had done the work and produced no evidence that the time that she claimed was unreasonable.

The district court cut the 37.06 hours without making any findings that the time was inaccurate, inflated, or fictitious, Petition A-14. The Court of Appeals held that "Reeves' testimony and secondary documentation supports her claim. The lack of contemporaneous records does not justify an automatic reduction in the hours claimed." Petition A-3. In effect, the Court of Appeals held that the district court abused its discretion by imposing a penalty without a factual basis.

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cases, while only 8.2% of the new filings during those three years were under civil rights acts. *Id.*, Tables 19 and 39. Thus it appears that civil rights cases are less likely than the average to be completed quickly.

CONCLUSION

For the reasons set out in this brief, the writ of certiorari should be denied.

Submitted by,

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